

**UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.**

In the Matter of:

LAJUANA HAYNES,

Respondent.

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DOCKET NO. 08-3485-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice dated November 15, 2007 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent **LAJUANA HAYNES** that HUD was proposing her debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the final determination of this action. The Notice further advised Respondent that the proposal to debar her was in accordance with the procedures set forth in 24 CFR part 24¹. In addition, the Notice informed Respondent that her proposed debarment was based upon violations of HUD requirements regarding her management of two HUD-insured multifamily projects, Wellston Townhouses and HDC Retirement Village.

A hearing on Respondent's proposed debarment was held in Washington, D.C. on August 13, 2008, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was present by phone along with her attorney, Steve Brooks, Esq. Stanley Field, Esq. appeared on behalf of HUD.

Procedural History

This matter originally was set for hearing on May 7, 2008. Respondent filed a Motion to Continue on April 18, 2008, requesting a new hearing date of June 18, 2008. The

¹ HUD published a final rule on December 27, 2007 (72 FR 73484) that relocated and recodified 24 CFR part 24 as 2 CFR part 2424. HUD's December 27, 2007, rule stated that the rule "adopts, by reference, the baseline provisions of 2 CFR part 180" the government-wide rule published by OMB on August 31, 2005 (70 FR 51863) setting forth guidance for agencies with respect to nonprocurement debarment and suspension. For ease of reference, this Determination will cite the regulations at 2 CFR part 180.

Debarring Official's Designee issued an Order setting a new hearing date of June 18, 2008. In a motion filed June 17, 2008, Respondent requested a further continuance. In an Order issued June 19, 2008, the Debarring Official's Designee set a new hearing date of August 13, 2008. The Debarring Official's Designee at the conclusion of the hearing advised the parties that the record would be kept open until September 3, 2008, for the parties' supplemental submissions. The Government filed a Request for Continuance to extend the time to file its response to Respondent's supplemental submission to September 9, 2008. The record closed on September 9, 2008.

Summary

I have decided, pursuant to 2 CFR part 180, to dismiss the proposed debarment of Respondent. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notice of Proposed Debarment to Respondent dated November 15, 2007.
- (2) The Government's Pre-Hearing Brief in Support of a Three-Year Debarment (including all exhibits and attachments thereto) filed April 10, 2008.
- (3) Respondent's Pre-Hearing Brief in Opposition to a Three-year Debarment (including all exhibits and attachments thereto) filed May 23, 2008.
- (4) The Affidavit of Respondent (with attachments and exhibits) filed August 26, 2008.
- (5) The Department's Response to Respondent's Post-Hearing Affidavit and Documents filed September 8, 2008.

Government Counsel's Arguments

Government counsel sets forth that Respondent was employed by Human Development Community Development Corporation (HDCDC) as the Executive Manager of Wellston Townhouses (Wellston) and HDC Retirement Village (HDCRV) at the time of the violations charged in the Notice. As Executive Manager, Respondent was responsible for all aspects of project management and operation.

Wellston was owned by Townhouses, Ltd.(Townhouses), a limited partnership whose general partner was HDCDC, and whose sole limited partner was Human Development Corporation (HDC). Counsel argues that in 2003, while Respondent was the project manager of Wellston, Townhouses paid HDCDC, its general partner, which also served as managing agent for Wellston, \$5453.00 in unearned management fees. At that time, Wellston was not in a surplus cash position and HDCDC promised to reimburse Wellston as soon as possible. Two years later, Wellston's records showed that it had not been reimbursed for the unearned fees.

Counsel argues that the payment of the fees was a clear violation of paragraph 8(b) of the Regulatory Agreement, which Townhouses executed in 1978. The Regulatory

Agreement, among other things, prohibited the use of project funds for any purpose other than reasonable operating expenses and necessary repairs, except if the project had surplus cash. Additionally, HDCDC and Townhouses had signed a Housing Management Agreement in 1990, which was witnessed by Respondent, in which HDCDC, as managing agent, was required to “comply with all pertinent requirements of the Regulatory Agreement.”

Counsel further argues that in September 2004, Townhouses improperly paid by a check drawn on Wellston’s account and signed by Respondent, a water bill of \$2,646.00² of an unrelated project, Grandview Apartments.³ Wellston also at that time was not in a surplus cash position. Further, Wellston’s principals were in no position to determine the project’s financial position because the project’s audited financial statements were not available until April 2006 and the prior year’s financials indicated a cash deficiency of \$130,430.00.

Government counsel also charges that Respondent, as manager of Townhouses, failed to keep the tenant security deposit account for Wellston fully funded. As of December 2005, Wellston’s Tenant Security Deposit Account was undefended by \$12,055.92.⁴ Counsel also alleges that Townhouses retained rent payments from tenants in excess of the amount owed under the Housing Assistance Payments (HAP) Contract covering the project. Townhouses’ failure to reimburse tenants timely for the rents overpaid allowed Townhouses to retain rental income it was not due.⁵

Government counsel further alleges that HDCDC owned and managed HDCRV, which was covered by a Regulatory Agreement executed in 1978 and by a Housing Management Agreement signed with HDCRV, which required HDCDC to comply with the Regulatory Agreement. In May 2004, HDCDC transferred \$4,229.00 to Wellston via a HDCRV check signed by Respondent. HDCRV’s audited financial statements for its fiscal year ending August 31, 2004, show that HDCRV was not in a surplus cash position

² The actual amount shown on the copy of the check is \$2,642.16. The water bills included in Gov’t Ex. 18 total \$2,751.77.

³ The supporting documents accompanying the water bills include apartment listings for both Grandview and Wellston Townhouses. It is not clear whether the disputed \$2,646.00 represents payment of both Grandview’s and Wellston’s water bills, or only Grandview’s, as the Government argues, and as the affidavit from the OIG auditor states. *See* Gov’t Ex. 21. The water bills, which show at least three different addresses, total \$2,751.77. These apparent discrepancies were not challenged nor explained by Respondent. In light of Respondent’s silence on this matter (Respondent does not address the payment of the water bills in any of her submissions), the Debarring Official accepts the Government’s claim that the water bills paid from Wellston’s funds were an unauthorized expenditure on behalf of Grandview Apartments.

⁴ Paragraph 8(g) of the Regulatory Agreement provides in pertinent part: “Any funds collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account.”

⁵ Paragraph 5(b) of the Regulatory Agreement provides that “The maximum rent for each Section 8 unit is stated in the Housing Assistance Payments Contract and adjustments in such rents shall be made in accordance with the terms of the Housing Assistance Payments Contract.”

at that time, but had a deficiency of \$2,911.00. The payment by Respondent, counsel contends, violated paragraph 8(b) Of the Regulatory Agreement.⁶

Counsel next argues that Respondent is subject to the debarment regulations because, as executive manager of a company, HDCDC, that owned or managed two projects insured and regulated by HUD, Respondent is a person who was a participant in a covered transaction. *See* 2 CFR part 180. Counsel argues that Respondent's acts and omissions are cause for debarment under 2 CFR 180.800(b) and (d). As the management agent of Wellston and HDCRV, Respondent violated the projects' respective Regulatory Agreements by improperly paying management fees, by using HUD-insured project assets for the benefit of other projects, by the withdrawal and underfunding of tenant security deposits, and by the retention of excess rent payments. According to Government counsel, these acts are grounds for debarment under 2 CFR 180.800(b).⁷ Counsel also argues that the violations are so serious and compelling that they demonstrate Respondent's lack of present responsibility, and are grounds for debarment under 2 CFR 180.800(d).

Counsel further argues that Respondent should be debarred because she "abused HUD programs by failing to follow HUD's directions regarding the hiring of responsible management, and misusing project, as well as tenant funds."⁸ In summing up, counsel argues that Respondent's debarment is necessary to protect the public interest. Respondent's "misconduct is clear and aggravating" to the extent "[t]he tenant security accounts remained underfunded, [and] [n]o apologies have been offered [by Respondent] for this clear breach of trust." Counsel goes on that "Respondent has not acted as a responsible partner and participant in HUD's programs. Instead, [Respondent] has acted in her own self-interest, and that of her employer's." Thus, Respondent's "past conduct demonstrates a lack of present responsibility . . . and a three-year debarment is warranted."

Respondent's Arguments

Respondent takes issue with the implication in the Government's brief that "the alleged improper conduct of Respondent's supervisors is being . . . imputed to Respondent."⁹ Respondent argues that she was never a party to the Regulatory

⁶ Paragraph 8(b) of the Regulatory Agreement provides in pertinent part that Owners shall not "pay out any funds except from surplus cash."

⁷ Under 2 CFR 180.800(b)(1), a person may be debarred for "A willful failure to perform in accordance with the terms of one or more public agreements or transactions." Under 2 CFR 180.800(b)(2), HUD may debar a person with a "history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions." Paragraph (b)(3) permits debarment for a "willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction."

⁸ *See* Gov't Pre-Hearing Brief at 16.

⁹ This Determination characterizes Respondent's position as implying that the Government is imputing others' misconduct to Respondent because the Government does not explicitly raise the imputation argument in its brief, nor did the Government raise the argument at the hearing. The only reference to the Government's imputing others' alleged misconduct to Respondent is the Government's citing verbatim the regulatory language at 2 CFR 180.630(b) along with other regulatory language relevant to the debarment

Agreements signed in 1978, and became managing agent for Wellston and HDCRV in March and May 2007, respectively.

Respondent explains the issue of incorrect rentals charged Wellston tenants as "[w]hat appears to be overbilling are late fees applied to subsequent month and delays in posting said late fees." Respondent also indicates that during the period March 1, 2005, to March 1, 2007, "Respondent was not charged with the preparation and management of the rent roles [sic]."¹⁰ Respondent adds that the overbilling results at times from the fact that "residents [are] entitled to certain credits due to retroactive annuals and retroactive interims."¹¹ Respondent also asserts that the transfer from Wellston's Tenant Security Deposit Account to its Operating Account¹² was a "mandate from her supervisor," and was done to "insure the viability of the project which is in accordance with the peoples overall mandate."¹³

With respect to the charge that \$7,000.00 was wrongly withdrawn from HDCRV's Tenant Security Deposit Account, Respondent argues that she did not request transfer of the funds. Further, Respondent claims that she "was not charged with the management of the security deposit account." Joseph Brown, her supervisor, now deceased, managed the account and "would have effected the transfer of funds."¹⁴

With regard to the transfer of \$4,229.00 from HDCRV to Wellston, Respondent asserts that the transaction was required because of a disbursement error by the Missouri Housing Development Commission (MHDC). Respondent states that she originally requested two individual special claims for Wellston and HDCRV, respectively. MHDC inadvertently aggregated both claims and deposited a total of \$22,229.00, only \$18,000.00 of which should have been credited to HDCRV. To correct MHDC's error, Respondent transferred the balance of \$4,229.00 to Wellston.

Respondent states in her defense that she was not responsible for Townhouses improperly paying HDCDC \$5453.00 in unearned management fees on behalf of Wellston. Respondent argues that she was an employee of HDCDC and was not responsible for calculating the fee. According to Respondent, the "Management Agent is responsible for ensuring accurate calculations & compliance." Respondent adds that she

process. See Gov't Pre-Hearing Brief at 5. It does not appear that the Government is relying on the imputation standard in this matter because, immediately following its exegesis of the debarment process, the Government lists the functions and tasks for which Respondent was responsible as Executive Manager. *Id.* at 6. The presentation of the Government's case at this point, and because there is no further reference to imputing others' misconduct to Respondent, suggests strongly that the Government is holding Respondent directly responsible for the violations recited in the Notice and elaborated on in the Government's brief and at trial.

¹⁰ See Resp. Pre-Hearing Brief at 2 (unpaginated).

¹¹ See Affidavit of Respondent, ¶ 7.

¹² Though not referenced in Respondent's Brief, the Government brief indicates that a transfer of \$13,500.00 was made in March 2003.

¹³ See Resp. Pre-Hearing Brief at 2 (unpaginated).

¹⁴ The Government states in its brief at p. 11, referring to the transfer of funds, "Mr. Noah admitted to this violation in his response to the audit report made by HUD's Office of Inspector General."

“was given a directive to disburse a monthly fee & was unaware of the percentage allotted by the agreement between HDCDC & DHUD.”¹⁵

Respondent concludes that her actions were not irresponsible, and she should not be debarred for three years.

Findings of Fact

1. Respondent was the executive manager at all relevant times of a company, HDCDC, which managed two HUD-insured multifamily properties, Wellston and HDCRV, owned by Townhouses, Ltd. and HDCDC, respectively.
2. The operation of the two properties was governed by separate Regulatory Agreements that the properties' owners entered into with HUD in 1978.
3. Respondent first became associated with the two properties some time around 1990.
4. Respondent became managing agent for Wellston and HDCRV in March and May 2007, respectively.
5. Respondent was not a party nor signatory to either Regulatory Agreement.
6. HDCDC signed respective Housing Management Agreements with Townhouses and HDCRV, which required HDCDC to comply with the requirements of the two Regulatory Agreements.
7. Respondent was not a party nor signatory to either Housing Management Agreement.
8. In 2003, while Respondent was the project manager of Wellston, Townhouses paid HDCDC, its general partner, which also served as managing agent for Wellston, \$5,453.00 in management fees.
9. The payment of the management fees was made at a time when Wellston was not in a surplus cash position.
10. As of December 2005, during the time Respondent served as manager of Townhouses, the tenant security deposit account for Wellston was underfunded by \$12,055.92.
11. In September 2004, Townhouses paid a water bill of \$2,646.00 for an unrelated project, Grandview Apartments, by a check drawn on Wellston's account and signed by Respondent.
12. At the time Townhouses paid the water bill, Wellston was not in a surplus position.
13. Wellston's tenants at various times overpaid their rent based on their portion due under the HAP Contract.
14. Overpaid rents did not properly belong to Townhouses, and the affected tenants were entitled to reimbursement of the amounts overpaid.
15. Wellston rent rolls, which were kept manually, show that various adjustments affecting the calculation of tenants' rents were continuously being made.
16. In May 2004, HDCDC transferred \$4,229.00 to Wellston via an HDCRV check signed by Respondent.

¹⁵ See Respondent's Pre-Hearing Brief at 3.

17. At the time of the transfer, HDCRV was not in a surplus cash position.
18. MHDC inadvertently aggregated special claims for Wellston and HDCRV and deposited the total amount of \$22,229.00 to HDCRV's account, of which \$4,229.00 should have been credited to Wellston.
19. HDCDC did not receive HUD's approval to transfer the \$4,229.00 to Wellston.
20. In November 2005, HDCDC withdrew \$7,000.00 from HDCRV's tenant security deposit account and deposited the \$7,000.00 into its rental account.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondent was a "participant" in a covered transaction, as defined in 2 CFR 180.980. *See also*, 2 CFR 180.915.¹⁶
2. Respondent's employer, HDCDC, executed two Regulatory Agreements and two Housing Management Agreements that covered the operation of the two projects that Respondent managed.
3. Respondent was not a party to, and did not sign, any of the four Agreements.
4. Respondent performed her duties under the direction of Executive Director Joseph Brown, now deceased.
5. Respondent cannot be held responsible for the withdrawal of the \$7,000.00 from HDCRV's account. First, the Government, except for its description of the transaction, provided no evidence of Respondent's involvement in "wrongly withdraw[ing]" the funds from HDCRV's account. In fact, the Government specifically alleges that "HDCDC wrongly withdrew [the] funds." Moreover, later the Government claims that "Mr. Noah admitted to this violation [i.e., the withdrawal of the \$7,000.00] in his response to the audit report made by HUD's Office of Inspector General."¹⁷ The lack of evidence of the specific role, if any, Respondent played in the withdrawal of the funds and the acknowledgment by the Government of Mr. Noah's admission, serve to exonerate Respondent of any responsibility for the transaction.
6. Respondent's testimony, her sworn affidavit, and the facts surrounding the transaction¹⁸ provide "adequate evidence" (*see* 2 CFR 180.900) to support the conclusion that the amount transferred was the amount that would have been credited to Wellston but for MHDC's error.

¹⁶ 2 CFR 180.915 defines an agent or representative as "any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction." 2 CFR 180.980 defines a participant as "any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant."

¹⁷ In a previous proceeding, the proposed debarment of Mr. Noah, the principal in HDCDC, was dismissed.

¹⁸ The Government's assertion that there is a discrepancy between the names of the tenants listed on the Special Claims forms and the Application for Housing Assistance is not easily resolvable on the state of the record before the Debarment Official. Nonetheless, it would seem that it would have to be an unlikely coincidence or sheer fortuity that a different and unrelated set of factors would produce the same disputed amount of \$4,229.00.

7. The Government provided no authority for its position that Respondent should have first notified HUD of the incorrect payment and receive approval before transferring the \$4,229.00 from HDCRV to Wellston. The Government is right that the “payment clearly was not for a reasonable operating expense of HDCRV.”¹⁹ Consequently, there was no need for Respondent or HDCDC to seek HUD’s approval before making the transfer. It is also irrelevant that HDCRV was not in a surplus cash position. The fact is unassailable that the \$4,229.00 did not belong to HDCRV. At best, HDCRV might have been put in the position of a custodian, holding funds that were properly the property of Wellston, and thus subject to payment on demand by Wellston.
8. There is no evidence in the record that the management fees paid by Townhouses on behalf of Wellston to HDCDC, Townhouses’ general partner, was “unearned,” as claimed by the Government. More importantly, the Government has not established a basis for holding Respondent responsible for a transaction that the Government argued was between Townhouses and HDCDC. The Government adduced no evidence that Respondent, as the “project manager” of Wellston in 2003, acted as a participant or principal or in any other capacity in the consummation of the transaction. Even if the payment of the fees is acknowledged as a violation of the Regulatory Agreement, it adds nothing to the Government’s case because Respondent was not a party to the Regulatory Agreement, therefore not contractually bound by its terms.
9. The evidence establishes that at times tenants overpaid their rent and that Townhouses retained the excess while it attempted to make adjustments or to post the necessary credits to the affected accounts. Nonetheless, the evidence, as far as can be discerned from the rent rolls, and based on Respondent’s testimony, points more in the direction of untimely disbursements caused by an archaic manual system rather than to a deliberate policy by Townhouses to retain rental income it was not due.²⁰
10. The evidence is clear that the security deposit account was underfunded. What is not clear, and the Government adduced no evidence on this point, is who was responsible for ensuring that the account was fully funded - Respondent or Joseph Brown, the Executive Director? Moreover, Respondent’s unrebutted testimony is that the management agent, not Respondent, was responsible for the maintenance of the security deposit account.
11. The charges in the Notice, elucidated in the Government’s Pre-Hearing Brief, focus on violations that occurred during the period 2003 to 2005. The Government refers to Respondent at times as a project manager of Wellston or as management agent of both properties.²¹ Respondent states that she did not become the managing agent for Wellston and HDCRV until March and May 2007, respectively. The Government argues that Respondent’s proposed “debarment is based upon her misconduct in her capacity as Executive Manager”

¹⁹ Gov’t Brief at 11.

²⁰ See, e.g., Affidavit of Respondent at ¶ 9, wherein Respondent asserts that the evidence from an examination of the rent rolls for the years 2003 to 2005 shows that there was no overbilling of residents and that HUD allows the project to charge for late payments, damages, and security deposits.

²¹ See Gov’t Pre-Hearing Brief at 7, 18.

- of Wellston and HDCRV.²² Although it is unclear when Respondent actually became the Executive Manager, Gov't Exs. 2 through 6, which cover the period 2002 to 2006, show correspondence to Respondent addressing her as Executive Manager or Respondent herself signing documents as Executive Manager. It is undeniable, therefore, that during the period charged in the Notice, Respondent was the Executive Manager of the two properties.
12. It is not readily apparent what the differences in duties and responsibilities are between the positions of Executive Manager²³ and managing agent. However, it is unnecessary, for present purposes, to resolve that issue because HUD has charged Respondent in her capacity as Executive Manager and, as shown, Respondent occupied that position between 2003 and 2005. However, it is Respondent's position that, even in her capacity as Executive Manager, she functioned at the direction of the Executive Director, Joseph Brown.
 13. Respondent, for example, states that with respect to the transfer in March 2003 of \$13,500.00 from Wellston's Tenant Security Deposit Account to its Operating Account, it would not have been done "absent a direction [sic] from Joseph Brown." It is unsettled who actually effected the transfer because Gov't Ex. 24, Monthly Report for Establishing Net Income, which records the transfer, is unsigned, though typed in the signature block is the title "Executive Manager." Respondent makes reference to Gov't Exhibit No. 35, Auditee Comments, Comment #4, wherein Herman Noah, Chairman of the Board of HDCDC, responds that "[w]e agree that security deposits were temporarily used to meet every [sic] increasing demands of the project." In light of the admission of Chairman Noah, and there being no direct evidence presented of Respondent's involvement in this transaction, Respondent cannot be held responsible for the transfer.
 14. Respondent did not address nor deny the charge that she signed the check to pay the water bill for Grandview Apartments, an unrelated project, from Wellston funds. For that reason, the charge is considered admitted. The payment of the water bill was a violation of the Regulatory Agreement. As discussed above, however, Respondent was not a party to the Regulatory Agreement, thus she was not contractually bound to observe its terms. For that reason, there is no basis to hold Respondent responsible, in contemplation of the debarment regulations, for the unauthorized payment.
 15. Even if Respondent were held to be bound by the Regulatory Agreements and the Housing Management Agreements, for the reasons discussed above, the evidence does not support a finding that "Respondent's acts and omissions"²⁴ demonstrate, as charged by the Government, a violation of 2 CFR 180.800(b)(1), (2), and (3), and §180.800(d). The evidence is insufficient to support a finding of Respondent's "willful failure to perform in accordance" with the Regulatory Agreement or Housing Management Agreement. Similarly, the evidence does not support a finding of "a history of failure to perform or of unsatisfactory performance" of the noted Agreements. Again, the evidence is insufficient to

²² See Gov't Pre-Hearing Brief at 2.

²³ See Resp. Ex. 7. No job description for the managing agent was provided by either party.

²⁴ *Id.* at 13.

conclude that Respondents acts or omissions show a “willful violation of a statutory or regulatory provision or requirement applicable to” any of the Agreements. Because Respondent either did not commit the acts charged, or acted at the instance of her supervisor, or believed she was engaging in a legitimate transaction, it would be unjust to hold that her “conduct [was willful because it was not] marked by careless disregard whether or not [she had] the right so to act.” *United States v. Murdock*, 290 U.S. 389 (1933) (citations omitted). Equally unjust would be to conclude that one wrongful act, e.g., an improper payment, amounts to a “history of failure to perform.”

16. The cases cited by Government counsel to support Respondent’s debarment are inapposite to this case. For example, in *In re: Curtis Johnson*, 79-2 BCA (CCH) P13,888, 1979 HUD BCA Lexis 17 (June 5, 1979), Mr. Johnson was the owner and identity of interest manager of his multifamily project who failed to file two financial statements, failed to submit monthly accounting reports, and failed to comply with tenant admission requirements, among other things. The judge found that Mr. Johnson’s derelictions demonstrated his “poor performance of [his] obligations [under the section 236] program.” *Johnson, supra*, at *21. Mr. Johnson was debarred, but his case is easily distinguishable from the instant case. First, Respondent was not the owner of either Wellston or Townhouses, and thus was not bound by the Regulatory Agreement as Mr. Johnson, who owned the project that was the subject of the debarment action. Secondly, Respondent was an employee of a company that managed the two properties. Thirdly, Respondent reported to an Executive Director who, in turn, reported to a Board. Consequently, Respondent was not free to make her own decisions as was Mr. Johnson who owned the project.

In *In re: Keith Heller*, HUDALJ 91-1575-DB (March 27, 1991), “Respondent and his affiliates commingled tenant security deposits and used them as security for a loan. [O]nce they lose their separate identity, they may be attached for owner debts.” No such allegation has been made against Respondent. In fact, as explained by Chairman Noah in the Auditee Comments to the OIG Report (Gov’t Ex. 35, Comment #4), on the issue of his company’s improper use of the tenant security deposits:

We agree the tenant security deposits were temporarily used to meet the every [sic] increasing demands of the project, while we waited for the release of funds from HUD of our reserves. It should be noted that request for funds out of the replacement reserve were often delayed by the [D]epartment of Housing and Urban Development without any explanation. We have repaid them and steps taken to insure their protection in the future.

The facts in the other case cited by the Government, *In re: Richard Ira Hayley*, HUDBCA No. 91-5364-D-90 (September 4, 1991), hardly bear any resemblance to the instant case. Hayley was debarred for equity skimming (almost \$281,454.00 of the project funds), which he used to support other businesses in

which he had an interest. In the instant case, the tenant security deposit account, which, for the reasons stated by Mr.Noah, was underfunded by \$12, 055.92 as of December 31, 2005,²⁵ is now fully funded.

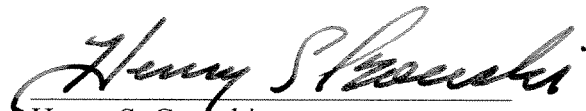
For all the foregoing reasons, the Government has failed to establish by a preponderance of the evidence that a cause for debarment exists.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined to dismiss the debarment action proposed by HUD against Respondent in HUD's Notice dated November 15, 2007.

Dated: _____

24 Oct. 2008



Henry S. Czauski
Debarring Official

²⁵ *Id.* at 9.